IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 23, 2008

STATE OF TENNESSEE v. SCOTT HOUSTON NASH

Appeal from the Circuit Court for Dickson County
No. CR7403 Robert E. Burch, Judge

No. M2007-00792-CCA-R3-CD - Filed March 27, 2008

The Defendant, Scott Houston Nash, was convicted by a Dickson County jury of driving under the influence (fourth offense), a Class E felony, and sentenced to serve two years in the Department of Correction as a Range I, standard offender. In this direct appeal, the Defendant raises three issues for our review: (1) whether the trial court abused its discretion by failing to grant a mistrial after a witness spontaneously made hearsay statements regarding the Defendant's prior convictions for driving under the influence; (2) whether it was an abuse of discretion for the trial court to allow a judicial commissioner to testify for the State about the Defendant's drunken appearance the day he was arrested; and (3) whether recalling his jury for the latter part of his bifurcated trial—three days after it had been discharged without admonition by the trial court—violated his right to be free from double jeopardy as guaranteed by the United States Constitution. Following our review of the appellate record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined. THOMAS T. WOODALL, J., not participating.

Kenneth K. Crites, Centerville, Tennessee, for the Appellant, Scott Houston Nash.

Robert E. Cooper, Jr., Attorney General and Reporter; James E. Gaylord, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and R. Stephen Powers, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

Following his February 18, 2004 arrest, a grand jury issued a three count indictment against the Defendant, alleging that he had committed the following offenses: (1) driving under the influence of an intoxicant (fourth offense), in violation of Tennessee Code Annotated section 55-10-401(a)(1);

(2) driving while having an alcohol concentration in his blood or breath of ten hundredths of one percent (.10%) or greater (fourth offense), in violation of Tennessee Code Annotated section 55-10-401(a)(2);[1] and (3) driving while his license was suspended. The Defendant elected to have a trial by jury.

At the trial, Officer Orval Sesler testified that he had been a police officer with the Dickson Police Department for approximately twenty years. On February 18, 2004, Officer Sesler was on duty and received a call from dispatch regarding a white Jeep Cherokee vehicle that was "weaving" as it traveled on the nearby interstate highway. The white Jeep was being followed by firefighter Patricia Walsh of the Dickson Fire Department, who was driving an official fire department vehicle. Walsh had alerted the Dickson police dispatcher to the abnormal driving.

Officer Sesler positioned his patrol car so he could observe the white Jeep, and he saw it exit the interstate. The officer then maneuvered his police cruiser behind the white Jeep and "immediately turned the blue lights on him because" he did not want the driver of the Jeep to get away or "possibly hurt himself." After Officer Sesler activated his patrol car's blue lights, the Defendant, who was driving the white Jeep, turned into a gas station and "began to circle the gas pumps." Walsh pulled the fire department vehicle in front of the Defendant, activated her vehicle's red lights, and "blocked him from going out of the gas pumps." The Defendant then stopped.

At the same time Officer Sesler exited his patrol car, the Defendant exited the Jeep. The Defendant was "unsteady on his feet," and Officer Sesler could smell alcohol about his person. Officer Sesler had to catch the Defendant "once or twice to keep him from falling" as he tried to demonstrate field sobriety tests. Because the Defendant was not able to attempt any field sobriety tests, Officer Sesler arrested him for driving under the influence and placed him in his patrol car. Officer Sesler explained that another reason he arrested the Defendant for driving under the influence was that he had slurred speech to the point that the officer had a difficult time understanding the Defendant when he spoke.

After the arrest, Officer Sesler found an empty, pint-sized bottle of whiskey laying in the passenger seat of the Defendant's Jeep. Then, the Defendant fell asleep in the patrol car as Officer Sesler drove him to the police station. When they arrived, Officer Sesler had "the magistrate" view the Defendant before taking him to the hospital.

During the officer's direct testimony, the State played a videotape of the Defendant's arrest for the jury.[2] The videotape is not included in the record on appeal.

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[1] We note that subsequent to the Defendant's indictment in the present case, this provision of our code has been amended so as to proscribe driving while the alcohol concentration in one's blood or breath is eight-hundredths of one percent (.08%) or more.

[2] Later testimony established that the videotape of the Defendant was created at approximately 12:30 p.m.

Firefighter Patricia Walsh testified that on February 18, 2004, she was in uniform as she drove a fire department vehicle westbound on Interstate 40 when she noticed a white Jeep being driven erratically. Walsh related her observation as follows: "I observed a white Jeep that was all over the highway, going pretty much from guard rail to guard rail, slowing down, speeding up, just —[he] was going to cause an accident or kill[] himself one."

Walsh "called dispatch" and informed that this Jeep was traveling toward Dickson on Interstate 40. She then followed the Jeep when it exited the interstate and observed Officer Sesler pull the Defendant over at a gas station where she also stopped, "blocking" the Defendant because she did not know "if he was going to stop or what." Because two-and-a-half years had passed between that day and the Defendant's trial, Walsh could not recall whether she noticed anything unusual about the Defendant after he exited his vehicle.

Harold Sutton, a Judicial Commissioner for the County and City of Dickson, testified that he observed the Defendant on the day he was arrested. Sutton explained that he met Officer Sesler at the police station when he arrived with the Defendant because a normal part of his job was "to give sobriety tasks." Sutton could not thoroughly evaluate the Defendant because when he arrived at the police station, he was "passed out." However, Sutton watched part of the videotape Officer Sesler had made of the Defendant prior to his arrest and then instructed Officer Sesler to transport the Defendant to a hospital emergency room "because of his level of intoxication." Sutton added, "I don't even know how he got back to Dickson without hurting or harming somebody."

Following cross-examination, and outside the presence of the jury, the defense moved for a mistrial on the grounds that it was unduly prejudicial for "an independent judicial commissioner" involved in the Defendant's case to testify as the State's witness and give an opinion regarding whether the Defendant was intoxicated on the day he was arrested. The defense argued that the commissioner was "a judge to some degree in the preliminary stages" of the Defendant's case and that it was improper for "the Judiciary Branch to testify in a criminal case on which they have sat." The trial court denied the motion.

Wanda Johnson, a licensed and certified physician's assistant testified as an expert in "the area of medicine." Johnson examined the Defendant on February 18, 2004 after he was brought to the hospital emergency room because the police were concerned about the amount of alcohol the Defendant had consumed and because he was vomiting. Johnson smelled a strong odor of alcohol about the Defendant, and he appeared intoxicated. As she examined the Defendant, he was "talkative" and "cooperative," and he volunteered to Johnson that he had argued with his girlfriend earlier in the day and then consumed "a pint of alcohol." Blood tests conducted at 1:35 p.m. demonstrated that the Defendant's blood alcohol level was .249 %. Additional blood tests conducted on the Defendant for illicit drugs were negative.

After the State and the defense had finished questioning Johnson, she and the trial court had the following exchange:

[Trial Court]: [W]hen you were treating the [D]efendant and you got back the initial blood test, did you base your course of treatment on that blood test?

[Johnson]: I did. The fact that we gave him a banana bag and the banana bag is only given for alcohol intoxication and not initially but somebody who you would—the police had told me that there had been other—they said that there had been other DUI arrests in the past and that he had—that this was an ongoing problem; and so I thought the banana bag would be appropriate.

In a jury-out hearing immediately following this exchange, defense counsel moved for a mistrial, arguing that it was highly prejudicial that Johnson had spontaneously revealed to the jury that the Defendant had been previously arrested for driving under the influence. The trial court denied the motion but asked if defense counsel wanted the court to issue an instruction to the jury directing them to disregard Johnson's statement about the Defendant's prior arrests. To avoid drawing any more attention to the statement, defense counsel declined to have the jury so instructed.

The Defendant did not testify or call any witnesses on his behalf.

Following deliberations, the jury convicted the Defendant on count one (driving under the influence of an intoxicant) and count two (driving with a blood alcohol concentration of .10% or more). The jury found him not guilty on count three (driving with a suspended license). The trial court entered judgment on the Defendant's convictions, merging counts one and two. The Defendant's trial took place on Friday, September 22, 2006.

After the jury announced its verdict, the trial court released them, instructing them to return to court on the following Tuesday at 9:00 a.m. when they would be available to serve on a different case. The trial court did not admonish the jury about discussing the Defendant's case before discharging them. After the jury had gone however, the trial court realized that it had failed to conduct the second part of the Defendant's bifurcated trial, which was necessary to have the jury determine whether the Defendant had been previously convicted of driving under the influence three times. Attempting to remedy the situation, the trial court ordered the court clerk to call each member of the jury, instruct them to return to the courthouse the following morning (Saturday) at 9:00 a.m., and not to discuss the Defendant's case.

Despite the instructions to the clerk to have the jury reconvene the following morning, and for reasons not revealed in the record, the jury did not return to the trial court until the morning of Monday, September 25, 2006. Before the jury was brought into the courtroom that morning, defense counsel moved for a dismissal, arguing that because the jury was dismissed the preceding Friday, jeopardy had attached. Defense counsel specifically voiced his concern that the jury likely discussed the Defendant's case over the weekend. The trial court denied the motion, ruling as follows:

> When a jury is discharged normally that completes the case; and I think in any other type of case I think your motion would be good. In this situation however, we have a bifurcated trial, a trial in two parts, so other than the admonition to talk about the case, the procedure is the same. If we had shutdown that day and come back today, it would be the same. I propose to ask the jury, when they come back in, if you know anybody has talked about the case or did anybody talk to them about the case more precisely. Obviously I'll have to react to what happened, but if . . . a juror is seriously compromised then we may have to have a mistrial, but denied at this time.

When the jury returned, they indicated to the trial court that they had not received any information about the Defendant's case outside the courtroom.

Officer Sesler was recalled to the witness stand and testified that the Defendant's certified driving record reflected that he had previously been convicted of driving under the influence three times prior to the February 18, 2004 incident.

After deliberations, the jury returned their verdict that the conviction for driving under the influence they had rendered three days before was the Defendant's fourth conviction for driving under the influence. The Defendant's motion for a new trial was subsequently denied, and he filed a timely notice of appeal.

Analysis

I. Witness statement about Defendant's prior convictions

On appeal, the Defendant argues that the trial court erred by denying his motion for a mistrial after physician's assistant Wanda Johnson alluded to the Defendant's prior arrests for driving under the influence while being questioned by the trial court. Relying on State v. David Wyrick, No. 1321, 1991 WL 87246 (Tenn. Crim. App., Knoxville, May 28, 1991), the Defendant contends that Johnson's statement was extremely prejudicial and that its introduction justified a mistrial, and as a result, that the Defendant's conviction should be vacated and a new trial granted.

In Wyrick, this Court held that the State's elicitation of testimony from the defendant regarding the defendant's five previous convictions for driving under the influence—during his trial for the same offense—warranted reversal of his conviction and a new trial. See Wyrick, 1991 WL 87246, at *5. However, Wyrick is distinguishable from the present case. In Wyrick, after the defendant mentioned being previously "caught for drunk driving" during his direct testimony, the State was erroneously allowed to cross-examine him as to each of his previous five convictions for driving under the influence in order to discredit his contention that he had not been drinking on the day in question. See id. at *2–5. In the present case, a witness unaffiliated with law enforcement or the State made a spontaneous statement under unrelated questioning by the trial court that implied the Defendant had been previously arrested for driving under the influence.

In a criminal trial, a mistrial should only be declared "in the event of a 'manifest necessity' that requires such action." State v. Reid, 164 S.W.3d 286, 341 (Tenn. 2005) (quoting State v. Hall,

976 S.W.2d 121, 147 (Tenn. 1998)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). An abstract formula should not be applied mechanically in determining whether a mistrial was necessary, and all relevant circumstances should be taken into account. State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993). Whether a mistrial should be granted is a determination left to the sound discretion of the trial court. Reid, 164 S.W.3d at 342 (citing State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994)). The trial court's decision should not be overturned absent an abuse of discretion. Id. Additionally, the party arguing that a mistrial should have been granted bears the burden of establishing its necessity. Id. (citing Williams, 929 S.W.2d at 388).

In State v. Lawrence Taylor, No. W2002-00183-CCA-R3-CD, 2003 WL 402276, at *4 (Tenn. Crim. App., Jackson, Feb. 14, 2003), this Court informed that there are three non-exclusive factors that may be evaluated in determining whether a mistrial was necessary because inappropriate testimony was presented to the jury: "(1) whether the [S]tate elicited the testimony; (2) whether the trial court gave a curative instruction; and (3) the relative strength or weakness of the State's proof." Id. (citing State v. Demetrius Holmes, No. E2000-02263-CCA-R3-CD, 2001 WL 1538517, at *4 (Tenn. Crim. App., Knoxville, Nov. 30, 2001)).

In the present case, evaluation of these factors leads us to conclude that a mistrial was not necessary. First, the State did not elicit the testimony at issue. The witness made the statement on her own volition. No one could have predicted she would come out with that information given the context of her discussion with the trial court. Second, the trial court did not give a curative instruction but only because the Defendant specifically decided against it.

Thirdly, and perhaps most decisively, the State's case against the Defendant was very strong: By the time Johnson offered the statement at issue, the jury had already been presented with the results of an inculpating blood test that showed his blood alcohol level was more than twice the legal limit, a videotape documenting the Defendant's appearance on the day he was arrested, and the testimony of four witnesses relating that the Defendant had been weaving "from guardrail to guardrail" as he drove his vehicle on the interstate, was unsteady on his feet, smelled of alcohol, had slurred speech, fell asleep in the police car, vomited, and admitted that he had consumed a pint of liquor. As the State asserts—this was not a close case. Accordingly, it was not an abuse of discretion for the trial court to deny the Defendant's request for a mistrial following Johnson's testimony.

II. Testimony of magistrate

The Defendant further argues that it was error for the trial court to allow the judicial commissioner who issued the warrant for the Defendant's arrest to testify at his trial. Specifically, he contends that Cannon 3 of the Code of Judicial Conduct prohibits such testimony, and he generally asserts that testimony from a judicial officer "created such bias as to result in an inherently prejudicial trial." We disagree.

Initially, we note that we find nothing in Cannon 3 of the Code of Judicial Conduct that specifically addresses the situation presented in the Defendant's case. See Tenn. Sup. Ct. R. 10, Canon 3.

Moreover, the State is correct in asserting that this Court has previously addressed this issue. In State v. Kevin Pendergrass, No. 87-287-III, 1988 WL 123021, at *1–2 (Tenn. Crim. App., Nashville, Nov. 18, 1988), this Court was presented with a nearly identical situation. In that case, the defendant argued that it was improper for a Dickson County Judicial Commissioner to testify at his trial on a charge of driving under the influence (third offense). Id. The defendant complained that the commissioner's testimony about his level of intoxication on the night he was arrested was inappropriate because the commissioner had seen him "in a purely official capacity." Id. at *2. There, the commissioner had testified that when he saw the defendant after his arrest for driving under the influence, "he was 'unsteady in his walk,' smelled strongly of alcohol, had slurred speech, bloodshot eyes and appeared to have had 'lots to drink.'" Id. at *1. This Court concluded that there was nothing improper about the commissioner's testimony. See id. at *2 (stating that the magistrate's testimony, presented at an independent proceeding after the night of the defendant's arrest, "was similar to a judge testifying at a subsequent habeas corpus proceeding, which is, of course, entirely proper" (citing Leighton v. Henderson, 414 S.W.2d 419, 422 (Tenn. 1967))). This issue lacks merit.

III. Double jeopardy

The Defendant further argues that, based on this Court's opinion in State v. Green, 995 S.W.2d 591 (Tenn. Crim. App. 1998), the Double Jeopardy Clause of the United States Constitution was violated when his jury was recalled after being discharged to determine how many times he had previously been convicted of driving under the influence. As a result, he asserts that his conviction for driving under the influence, fourth offense, should be vacated. The State counters that the Defendant waived this argument by acquiescing in the recall of the jury, and that in any event, "reconvening the jury in the second half of a bifurcated DUI proceeding simply does not implicate the policies of the Double Jeopardy Clause" because the latter half of the proceeding only relates to punishment.

We disagree with the State's contention that the Defendant waived this argument by acquiescing in the recall of the jury. Based on the transcripts included in the appellate record, it is clear that the trial court released the jury immediately after it reported its verdicts without consulting either party. Specifically, as soon as the foreperson of the Defendant's jury announced the verdict on the final count of his indictment, the trial court collectively polled the jurors and then stated as follows:

> Thank you ladies and gentleman, I appreciate your attendance and your work today. I look forward to seeing you Tuesday morning at 9:00, we'll do it again. Don't forget to call the machine after five o'clock on Monday just in case something were to happen, but I'd say the chance of trying something on Tuesday is pretty high. We're going to have some other proceedings at this point, but it is no use for you to stay, of course you are welcome to stay if you want; but you may be excused.

At this point, all of the jurors departed from the courthouse, and when the trial court attempted to reconvene them moments later, only one juror was located in the parking lot. Moreover, before the jury was brought into the courtroom the following Monday, the Defendant objected to their recall on double jeopardy grounds. Accordingly, we cannot agree with the State that the Defendant waived this argument by failing to lodge a timely objection.

The State points to State v. Patrick Hyder, No. E2005-00364-CCA-R3-CD, 2005 WL 2387155, at *3 (Tenn. Crim. App., Knoxville, Sept. 27, 2005), as standing for the proposition that a defendant's failure to object to the discharge of the jury amounts to a waiver of any double jeopardy argument. In Hyder, the jury reached a verdict on the defendant's two charges of rape of a child and aggravated sexual battery, but the jury was not permitted to announce their verdict in court because the defendant, being hospitalized, was not present. Id. at *1. The trial court instructed the jury foreman to seal the written verdicts in an envelope, and the trial court kept them secure until the defendant was healthy enough to return to the courtroom and hear the verdicts announced. Id. However, the trial court specifically consulted defense counsel about this course of action before releasing the jury, and defense counsel agreed to it. Id. at *3. Against that factual background, this Court concluded that the defendant had waived his argument that the trial court erred by reassembling the jury to announce its verdict. Id. This authority does not persuade us to conclude that the Defendant in this case waived his double jeopardy argument because here the Defendant was not consulted before the trial court on its own volition rapidly dismissed the jury.

Nonetheless, we agree with the State that the Double Jeopardy Clause was not offended by the dismissal and recall of the Defendant's jury. Tennessee case law makes it clear that, when a defendant is indicted for a second or subsequent offense for driving under the influence, a bifurcated proceeding is necessary. See State v. Ronnie Lamar Evans, No. E2000-00327-CCA-R9-CD, 2001 WL 501414, at *2 (Tenn. Crim. App., Knoxville, May 11, 2001) (citing State v. Robinson, 29 S.W.3d 476, 481–83 (Tenn. 2000)); see also State v. Sanders, 735 S.W.2d 856, 858 (Tenn. Crim. App. 1987). The bifurcated proceeding is necessary to provide procedural fairness for the defendant and minimize undue prejudice. See Evans, 2001 WL 501414, at *2. The first portion of such a trial is held to determine whether the defendant is guilty of driving under the influence. See id.; see also Tenn. Code Ann. § 55-10-401 (defining the offense of driving under the influence). If a defendant is found guilty, then the latter portion of the proceeding is held to determine the defendant's potential punishment. See State v. Ward, 810 S.W.2d 158, 159 (Tenn. Crim. App. 1991); see also Tenn. Code Ann. § 55-10-403(a)(1)(A) (providing the minimum punishments and fines for a defendant's second or subsequent conviction for driving under the influence).

When a defendant is charged with driving under the influence, second or subsequent offense, the defendant's prior convictions are not an element of the crime, nor do they add an additional charge. Evans, 2001 WL 501414, at *2 ("DUI, second or subsequent offense, is merely an enhancement of the punishment for DUI, and therefore the defendant's prior DUI convictions are not elements of the offense.") Rather, prior convictions for driving under the influence only affect a defendant's potential sentence by subjecting the defendant to increased punishment. Ward, 810 S.W.2d at 159 (stating that Tennessee Code Annotated section 55-10-403(a)(1) makes it clear "that

new offenses are not created for subsequent offenders but that those found to be subsequent offenders are subject to increased punishment").

The Defendant's reliance on Green is misguided. In Green, the defendant's jury announced a verdict of "not guilty" and was discharged before being called back into the courtroom to announce a verdict of "guilty" to a lesser included offense. Green, 995 S.W.2d at 607–09. In the present case, the Defendant's jury was not reassembled to make determinations regarding his guilt or innocence; they were reassembled only for the purpose of determining facts relevant to his sentence. Accordingly, the Defendant's constitutional protections against being twice placed in jeopardy for the same offense were not implicated. See Ward, 810 S.W.2d at 159.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE